

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File No. 0000865251
MINNESOTA PCS LIMITED PARTNERSHIP)	
)	
Request for Waiver and Extension of the)	
Broadband PCS Construction Requirements)	
)	

ORDER

Adopted: August 28, 2002

Released: August 29, 2002

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we address a request by Minnesota PCS Limited Partnership ("MN PCS") for waiver and an extension of time to satisfy the construction requirements for two of its broadband Personal Communications Services ("PCS") licenses.¹ Specifically, pursuant to sections 1.925 and 1.946 of the Commission's rules, MN PCS asks for a thirty-day extension of time in order to satisfy its construction requirements of section 24.203(b) for stations KNLG948, the F Block 10 MHz license for the Fergus Falls, Minnesota, BTA142 ("Fergus Falls BTA") and KNLF934, the F Block 10 MHz license for the Bemidji, Minnesota BTA037 ("Bemidji BTA").² For the reasons stated below, we grant MN PCS's waiver request for the Fergus Falls and Bemidji BTAs.

II. BACKGROUND

2. MN PCS is the licensee for a number of broadband PCS licenses, including KNLG955 (the 10 MHz D Block license for the Brainerd, Minnesota BTA, BTA054); KNLG947 (the 10 MHz F Block license for the Eau Claire, Wisconsin BTA, BTA123); KNLG948 (the 10 MHz F Block license for the Fergus Falls, Minnesota BTA, BTA142); KNLF934 (the 10 MHz F Block license for the Bemidji, Minnesota BTA, BTA037); and KNLG953 (the 10 MHz F Block license for the Worthington, Minnesota BTA, BTA481). On April 26, 2002, MN PCS filed its Extension Request, seeking an additional 30 days, *i.e.*, from April 28, 2002 to May 28, 2002, to complete construction for these five BTAs. Pursuant to section 24.203(b) of the Commission's rules, 10 MHz broadband PCS licensees are required to provide service to at least one-quarter of the population of their licensed areas or make a showing of substantial

¹ See File No. 0000865251, filed April 26, 2002, and as amended on May 10, 2002 and August 26, 2002 (Extension Request).

² MN PCS also requests a waiver of section 24.203(a) of the Commission's rules. See Extension Request at 1. Section 24.203(a) sets forth construction requirements for licensees of 30 MHz blocks. We do not address MN PCS's request for waiver of section 24.203(a) because it is inapplicable to the licenses at issue, which are 10 MHz and therefore subject to section 24.203(b) of the Commission's rules.

service within five years of initial license grant.³ Based on their original grant date, the five-year deadline for the five licenses at issue was April 28, 2002.

3. On May 10, 2002, MN PCS amended its Extension Request to withdraw the licenses for stations KNLG955, KNLG947 and KNLG953 from the scope of its waiver request because it had completed construction for these three licenses by the construction deadline.⁴ MN PCS indicated that it only needed an extension for the Fergus Falls and Bemidji BTAs. On May 23 and May 22, 2002, MN PCS filed construction notifications for both the Fergus Falls and Bemidji BTAs, respectively.⁵ MN PCS stated that it received the backhaul facility for both markets on May 14, 2002 and immediately commenced operation of its systems as of May 14, 2002.⁶ Further, MN PCS stated that it was providing service to 26.62 percent of the population of its licensed service area for the Fergus Falls BTA and 33.71 percent of the population of its licensed area for the Bemidji BTA, thereby exceeding the 25 percent requirement for 10 MHz Block licenses.⁷ On August 26, 2002, at the request of Commission staff, MN PCS amended its Extension Request to provide additional information and confirm satisfactory completion of construction for the Fergus Falls and Bemidji BTAs as of May 14, 2002.⁸

III. DISCUSSION

4. Without grant of extension of time or a waiver of the PCS construction rule, MN PCS's licenses for the Fergus Falls and Bemidji BTAs automatically terminated as of the April 28, 2002 construction deadline for failure to meet the construction requirements. Pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission's rules, a broadband PCS license will terminate automatically as of the construction deadline if the licensee fails to meet the requirements of section 24.203, unless the Commission grants an extension request or waives the PCS construction requirements.⁹ An extension of time to complete construction may be granted, pursuant to sections 1.946(e) and 24.843(b) of the Commission's rules, if the licensee shows that the failure to complete construction is due to causes beyond its control.¹⁰ Furthermore, in recognizing that compliance with the broadband PCS construction requirements may be difficult at times, the Commission stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving the PCS construction requirements on a case-by-case basis.¹¹ Waiver may be granted, pursuant to section 1.925 of the Commission's rules, if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver

³ 47 C.F.R. § 24.203(b).

⁴ See File No. 0000865251 as amended on May 10, 2002.

⁵ See File No. 0000898051, filed May 23, 2002 ("Fergus Falls Construction Notification"); File No. 0000897635, filed May 22, 2002 ("Bemidji Construction Notification"). See also File No. 0000865251 as amended on August 26, 2002 at 1 (August Amendment to Extension Request).

⁶ See Fergus Falls Construction Notification, attachment entitled "Demonstration of Compliance with 5-Year Construction Rqmt," ("Fergus Falls Exhibit"); Bemidji Construction Notification, attachment entitled "Demonstration of Compliance with 5-Year Construction Rqmt" ("Bemidji Exhibit").

⁷ See Fergus Falls Exhibit at 2; Bemidji Exhibit at 2.

⁸ See August Amendment to Construction Request.

⁹ 47 C.F.R. §§ 1.946(c), 1.955(a)(2), 24.203.

¹⁰ 47 C.F.R. §§ 1.946, 24.843. Section 1.946(e) also states specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

¹¹ See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994) (PCS MO&O), citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹²

5. In its Extension Request, MN PCS represents that all base station and switching equipment for the markets at issue had been ordered, installed, tested and ready to commence service prior to the construction deadline.¹³ MN PCS contends that it would have been able to satisfy its construction requirements in a timely manner, but for unforeseen delays in establishing its backhaul connections, including its DS1 connections.¹⁴ According to MN PCS, orders were placed for the necessary DS1 connections with requested due dates of April 5th for the Fergus Falls BTA and April 23rd for the Bemidji BTA.¹⁵ MN PCS represents that the actual timing and installation of its DS1 connections were entirely within the control of the local exchange carrier and/or competitive access provider, and “their inability to install critical backhaul facilities within the reasonable time frames requested by MN PCS creates an obstacle to meeting the deadline that is beyond MN PCS’s control.”¹⁶ MN PCS further contends that a sufficient amount of time was allotted for delivery of the backhaul facilities, explaining that its timeframe for completion of construction was “reasonable and customary,” based upon its experience with other landline projects in these markets.¹⁷ Moreover, MN PCS claims that there was no reasonable substitute for the landline backhaul facilities, given that the facilities must bridge long distances in rural Minnesota and South Dakota and that point-to-point microwave facilities, while a technically feasible alternative, would impose tremendous costs.¹⁸ MN PCS also argues that grant of a waiver is warranted because it will serve the public interest and the Commission’s construction goal of providing service to rural areas.¹⁹ As noted in MN PCS’s Extension Request, Fergus Falls has a population density of “less than thirty persons per square mile, ranking [it] in the lower 25th percentile of all markets in terms of population density,” while Bemidji has a population density of “eleven persons per square mile, ranking it in the lower 10th percentile of all markets.”²⁰ MN PCS argues that a *de minimis* extension of time will result in the expeditious provision of PCS services to these rural and underserved populations, providing these communities with the benefit of another telecommunications option.²¹

6. In this case, we find that a short extension of time to meet the PCS construction requirements is warranted based upon the totality of the circumstances, including the delays caused by events that were not reasonably anticipated, the diligent efforts by MN PCS prior to the deadline and its level of construction at the deadline, the *de minimis* nature of the extension, and MN PCS’s plan to deploy broadband PCS services in rural areas. While a licensee should reasonably expect last-minute delays and should take those into account when planning the construction of its system, we find that MN PCS acted diligently in completing construction despite the unforeseeable circumstances surrounding the

¹² 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3, the Commission has authority to waive its rules if there is “good cause” to do so. 47 C.F.R. § 1.3. *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

¹³ *See* Extension Request at 2-3, 7.

¹⁴ *See* Extension Request at 4, August Amendment to Extension Request at 2.

¹⁵ *See* Extension Request at 3-4.

¹⁶ Extension Request at 4.

¹⁷ *See* August Amendment to Extension Request at 2.

¹⁸ *See* August Amendment to Extension Request at 2.

¹⁹ *See* Extension Request at 5-6.

²⁰ Extension Request at 5.

²¹ *See* Extension Request at 6.

system construction. Based upon MN PCS's experience with these particular markets, MN PCS indicates that the timeframe allotted for ordering and installing backhaul facilities was reasonable and customary.²² In light of these circumstances, we believe that MN PCS has been diligent in constructing its markets and that, but for circumstances beyond its control, MN PCS would have satisfied the construction requirements in a timely manner. Indeed, the fact that MN PCS amended its extension request to indicate timely provision of service for three of the five markets suggests that MN PCS allotted sufficient time to construct its network and would have satisfied its requirements but for the unforeseen delays in establishing its backhaul connections. Further, despite these difficulties, MN PCS actually satisfied the construction requirements for the Fergus Falls and Bemidji BTAs within sixteen days of its deadline.²³

7. Furthermore, grant of a very brief extension in this case is warranted serves the public interest by allowing MN PCS to implement its proposed plan to bring service to rural and otherwise underserved areas. The two BTAs in question are rural markets.²⁴ We have found that rural markets are, as expected, more likely to be underserved by virtue of their sparse population than more urban areas.²⁵ MN PCS's proposed service to these rural and underserved markets is consistent with statutory and Commission policy directives to ensure service to rural areas using licenses that are awarded through competitive bidding,²⁶ Commission statements encouraging PCS service to rural areas,²⁷ and recent action by the Wireless Telecommunications Bureau's Commercial Wireless Division on similar requests for extension of time involving rural and sparsely-populated areas.²⁸ Moreover, as we have noted in similar requests,²⁹ even to the extent that some commercial wireless carriers are providing service to parts of the BTAs, MN PCS's construction will benefit consumers in terms of the choices available to them and is likely to promote vigorous competition in the marketplace. Accordingly, for the foregoing reasons, we find a short extension of time is warranted and therefore grant MN PCS's request.

8. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the Request for Waiver and Extension of the Broadband PCS Construction Requirements filed by Minnesota PCS Limited Partnership on April 26, 2002, as amended on May 10,

²² See August Amendment to Extension Request at 2.

²³ See Extension Supplement at 1.

²⁴ As MN PCS points out, the Fergus Falls and Bemidji BTAs have population densities that place them in the lower 25th and lower 10th percentile of all markets, respectively. See Extension Request at 5.

²⁵ See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixth Report*, FCC 01-192, Appendix C, Table 5 (rel. Jul. 17, 2001) (demonstrating that, of the lower quartile of counties in terms of population, only 18.0% have 3 or more mobile telephone providers compared to 93.2% of the highest quartile of counties).

²⁶ See 47 U.S.C. § 309(j)(4)(B) ("...the Commission shall...include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas...").

²⁷ See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5018 (1994) (*PCS MO&O*) ("ensure that PCS service is made available to as many communities as possible and that spectrum is used efficiently").

²⁸ See, e.g., Leap Wireless International, Inc., Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd. 19573, 19577 (WTB Comm. Wir. Div. 2001) (*Leap*).

²⁹ See, e.g., Trustee in Bankruptcy for Magnacom Wireless, LLC and Telecom Wrap Up Group, LLC, Petition for Waiver and Extension of Broadband PCS Construction Requirements, *Order*, DA 02-1243 (rel. May 24, 2002).

2002 and August 26, 2002, IS HEREBY GRANTED to extend the five-year construction deadline for the Fergus Falls and Bemidji BTAs for a period of sixteen days, from April 28, 2002 to May 14, 2002.

FEDERAL COMMUNICATIONS COMMISSION

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